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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

10 TERRY L. CROSS,

11 Petitioner,

12 v.

13 JEFFERY UTTECHT.

14 Respondent.

CASE NO. 11-cv-5469RJB

REPORT AND  
RECOMMENDATION

NOTED FOR:  
OCTOBER 28, 2011

15 This petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 has  
16 been referred to United States Magistrate Judge J. Richard Creatura pursuant to 28  
17 U.S.C. § 636(b) (1) (A) and (B), and local Magistrate Judge Rules MJR3 and MJR4.  
18 This is a mixed petition with one exhausted ground for relief and one unexhausted  
19 ground for relief. The court recommends the petitioner be given the option of  
20 dismissing his unexhausted ground for relief and proceeding on the exhausted ground:  
21 or that he dismiss the petition without prejudice as a mixed petition.  
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The State alleged that Cross committed count I between December 1, 2007, and April 4, 2008<sup>1</sup> and count II on April 5, 2008. Cross pleaded guilty to both counts. Section 4 of Cross's statement on plea of guilty incorrectly stated that counts I and II "occurred during 12/1/07 to 4/4/08." Clerk's Papers (CP) at 7. Section 11 of the statement reported that "between 12/1/07 [and] 4/5/08 I twice had unlawful sexual contact with G.P., who I was more than 36 mo[nth]s older than [and] who is less than 12 y[ea]rs old and I am not married to." CP at 14-15. In the plea colloquy, the court recited the correct dates, and Cross confirmed that section 11 accurately stated what he had done. The trial court accepted Cross's pleas "as knowingly, intelligently and voluntarily given." Report of Proceedings at 8. The court later rejected Cross's request for a special sex offender sentencing alternative (SSOSA) sentence and imposed a standard range sentence.

<sup>1</sup> [Court's Footnote:] At the plea colloquy, the State corrected a scrivener's error that listed the beginning date for count I as December 1, 2008.

1 Wn.2d 849, 852, 953 P.2d 810 (1998). The trial court did not err in finding  
2 that his pleas were knowing and voluntary.

3 Cross argues that his counsel ineffectively represented him during  
4 the plea process. To prevail on a claim of ineffective assistance, he must  
5 show: (1) that his counsel's representation fell below an objective standard  
6 of reasonableness and (2) the deficient performance prejudiced him. To  
7 demonstrate prejudice Cross must show that but for counsel's deficient  
8 representation, the result probably would have been different. *Strickland v.*  
9 *Washington*, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674  
10 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-355, 899 P.2d 1251  
11 (1995).

12 First, Cross contends that his counsel coerced him into pleading  
13 guilty by "pressuring and exploiting [his] naiveté." Statement of Additional  
14 Grounds for Review at 4. But in both his statement on plea of guilty and  
15 during colloquy with the court, Cross stated that "[n]o one has threatened  
16 harm of any kind to me . . . to cause me to make this plea" and that "[n]o  
17 person has made promises of any kind to cause me to enter this plea." CP at  
18 14. His claim of coercion fails.

19 Second, Cross faults his counsel for not informing him that he would  
20 be subject to conditions of community custody for the rest of his life and  
21 that violating one of those conditions could result in being incarcerated for  
22 life. But his statement on plea of guilty informed him of that lifetime period  
23 of community custody and the consequences of violating the conditions of  
24 community custody.<sup>2</sup> He does not demonstrate that he was misinformed as  
to the consequences of his plea.

Third, Cross contends that his counsel did not advise him of the  
rights he was giving up by pleading guilty. Again, however, his statement  
on plea of guilty clearly states those rights and both his counsel and the  
judge confirmed that he understood that by pleading guilty he was waiving  
those rights.

Fourth, Cross criticizes his counsel for mentioning that he had taken  
a polygraph.<sup>3</sup> But this disclosure was a necessary part of Cross's request for  
a SSOSA sentence, which the court later rejected. His counsel was not  
ineffective for mentioning the polygraph.

Fifth, Cross argues that his counsel should have had him evaluated  
for competency because he had had a traumatic brain injury. But defense

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<sup>2</sup> [Court's Footnote:] That statement also informed him that he would be subject to  
60 days of confinement for the first two violations of the community custody conditions  
and would be subject to reincarceration, for up to life, for a third violation.

<sup>3</sup> [Court's Footnote:] There were apparently two polygraph tests, the first was not  
completed and the second indicated no deception.

1 counsel must request a competency determination only if he has reason to  
2 doubt the defendant's competency. *City of Seattle v. Gordon*, 39 Wn.App.  
3 437, 441, 693 P.2d 741 (1985). And that doubt arises if counsel has reason  
4 to question whether the defendant: (1) understands the charge and  
5 consequences of conviction; (2) understands the facts giving rise to the  
6 charge; and (3) is able to relate the facts to his attorney to help prepare the  
7 defense. *Gordon*, 39 Wn.App. at 442. During his plea colloquy, Cross said  
8 that he understood the charges, understood the consequences of conviction,  
9 and understood the underlying facts. Thus, he has not shown that counsel  
10 had reason to doubt his competency such that he should have requested a  
11 competency determination.

12 Finally, Cross maintains that he did not understand the consequences  
13 of his pleas. But as discussed above, his signed statement on plea of guilty  
14 creates a strong presumption that his pleas were knowing, voluntary[,] and  
15 intelligent. He points to no evidence that would overcome that presumption.

16 The trial court did not err in accepting Cross's pleas of guilty. We  
17 affirm.

18 (ECF No. 16, Exhibit 7 pages 1-5).

### 19 PROCEDURAL HISTORY

20 Petitioner appealed his judgment and sentence to the Washington State Court of  
21 Appeals (ECF No. 16, Exhibit 3). The opening brief raised one ground for relief:

22 Is appellant's guilty plea constitutionally invalid where it was not  
23 knowing, voluntary, and intelligent as due process requires because the trial  
24 court misinformed him about the nature of the charges?

(ECF No. 16, Exhibit 3, page 1). In a statement of additional grounds for review  
petitioner added two other grounds for review:

1. Defense, Trial Counsel, was deficient and representation was below  
the functioning standard guaranteed by the U.S. Constitution within  
the V, VI, and XIV § 1 Amendments and the Washington State  
Constitution, Article 1 § 22.
2. The appellant's plea of guilty is constitutionally invalid, violating his  
rights within the U.S. Constitutions V, VI, and XIV § 1  
Amendments and the Washington State Constitutions article 1 §§ 3  
and 22.

1 (ECF No. 16, Exhibit 4 pages 1 and 11).

2 The Washington Court of Appeals issued an unpublished opinion in which the  
3 court affirmed his judgment and sentence (ECF No.16, Exhibit 7). A motion for  
4 reconsideration was denied. Petitioner then filed a motion for discretionary review with  
5 the Washington State Supreme Court where he raised the following single ground for  
6 relief:

- 7 1. Was Petitioner's trial counsel ineffective for not having Petitioner  
8 evaluated for competency?

9 (ECF No. 16, Exhibit 10 page2). The Washington State Supreme Court denied review  
10 and the mandate from the Washington State Court of Appeals issued April 7, 2011 (ECF  
11 No. 16, Exhibits 11 and 12).

12 In his federal Habeas Corpus petition petitioner raises the following two grounds  
13 for relief:

- 14 1. Petitioner was denied his right to effective assistance of counsel. A  
15 violation of Federal Constitution – Sixth Amendment.  
16 2. Petitioner's rights were violated due to his incompetency. This was a  
17 violation of the Federal Constitution – Fourteenth Amendment.

18 (ECF No. 1, pages 6 and 8).

19 **EVIDENTIARY HEARING NOT REQUIRED**

20 Evidentiary hearings are not usually necessary in a habeas case. According to 28  
21 U.S.C. §2254(e)(2) (1996), a hearing will only occur if a habeas applicant has failed to  
22 develop the factual basis for a claim in state court, and the applicant shows that: (A) the  
23 claim relies on (1) a new rule of constitutional law, made retroactive to cases on  
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1 collateral review by the Supreme Court that was previously unavailable, or if there is  
2 (2) a factual predicate that could not have been previously discovered through the  
3 exercise of due diligence; and (B) the facts underlying the claim would be sufficient to  
4 establish by clear and convincing evidence that but for constitutional error, no  
5 reasonable fact finder would have found the applicant guilty of the underlying offense.  
6 28 U.S.C. §2254(e)(2) (1996).

7         Petitioner’s claims rely on established rules of constitutional law. Further, there  
8 are no factual issues that could not have been previously discovered by due diligence.  
9 Finally, the facts underlying petitioner’s claims are insufficient to establish that no  
10 rational fact finder would have found him guilty of the crime. Therefore, this court  
11 concludes that an evidentiary hearing is not necessary to decide this case.  
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### 13                                 STANDARD OF REVIEW

14         Federal courts may intervene in the state judicial process only to correct  
15 wrongs of a constitutional dimension. Engle v. Isaac, 456 U.S. 107 (1983). Section  
16 2254 explicitly states that a federal court may entertain an application for writ of  
17 habeas corpus “only on the ground that [the petitioner] is in custody in violation of the  
18 constitution or law or treaties of the United States.” 28 U.S.C. § 2254(a) (1995). The  
19 Supreme Court has stated many times that federal habeas corpus relief does not lie for  
20 mere errors of state law. Estelle v. McGuire, 502 U.S. 62 (1991); Lewis v. Jeffers,  
21 497 U.S. 764 (1990); Pulley v. Harris, 465 U.S. 37, 41 (1984);  
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23         A habeas corpus petition shall not be granted with respect to any claim  
24 adjudicated on the merits in the state courts unless the adjudication either: (1) resulted

1 in a decision that was contrary to, or involved an unreasonable application of, clearly  
2 established federal law, as determined by the Supreme Court; or (2) resulted in a  
3 decision that was based on an unreasonable determination of the facts in light of the  
4 evidence presented to the state courts. 28 U.S.C. §2254(d). Further, a determination  
5 of a factual issue by a state court shall be presumed correct, and the applicant has the  
6 burden of rebutting the presumption of correctness by clear and convincing evidence.  
7 28 U.S.C. §2254(e)(1).

### 8 DISCUSSION

#### 9 A. *Mixed Petitions.*

10 Respondent concedes petitioner's first ground for relief is exhausted but  
11 contends the second ground for relief regarding competency is unexhausted (ECF No.  
12 15, pages 5 to 13). Respondent urges the court to dismiss the entire petition arguing  
13 the second ground for relief is meritless (ECF No. 15, page 6 citing 28 U.S.C. § 2254  
14 (b)(2)). The court first examines the second ground for relief to determine if it is  
15 exhausted. Petitioner alleges he was incompetent to plead guilty (ECF No. 1, page 8).

#### 16 1. Exhaustion.

17 A state prisoner seeking habeas corpus relief in federal court must exhaust  
18 available state relief prior to filing a petition in federal court. As a threshold issue the  
19 court must determine whether or not petitioner has properly presented the federal habeas  
20 claims to the state courts. 28 U.S.C. § 2254(b)(1) states, in pertinent part: An  
21 application for a writ of habeas corpus on behalf of a person in custody pursuant to the  
22 judgment of a state court shall not be granted unless it appears that: (A) the applicant has  
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1 exhausted the remedies available in the courts of the state; or (B)(i) there is an absence of  
2 available state corrective process; or (ii) circumstances exist that render such process  
3 ineffective to protect the rights of the applicant. If respondent intends to waive the  
4 defense of failure to exhaust state remedies, respondent must do so explicitly. 28 U.S.C.  
5 § 2254 (b)(3). To exhaust state remedies, petitioner's claims must have been fairly  
6 presented to the state's highest court. Picard v. Connor, 404 U.S. 270, 275 (1971);  
7 Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985) (petitioner "fairly presented" the  
8 claim to the state Supreme Court even though the state court did not reach the argument  
9 on the merits).

10  
11 A federal habeas petitioner must provide the state courts with a fair opportunity to  
12 correct alleged violations of federal rights. Duncan v. Henry, 513 U.S. 364, 365 (1995)  
13 (*citing* Picard, 404 U.S. at 275). Petitioner must have exhausted the claim at every level  
14 of appeal in the state courts. Ortberg v. Moody, 961 F.2d 135, 138 (9th Cir. 1992). It is  
15 not enough that all the facts necessary to support the federal claim were before the state  
16 courts or that a somewhat similar state law claim was made. Duncan, 513 U.S. at 365-66  
17 (*citing* Picard, 404 U.S. at 275 *and* Anderson v. Harless, 459 U.S. 4 (1982)). The sole  
18 ground for relief that petitioner presented to the Washington State Supreme Court was an  
19 ineffective assistance of counsel claim (ECF No 16, Exhibit 10, page 2). The  
20 incompetence ground for relief was not presented as a separate claim. It is unexhausted.

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22 "An applicant shall not be deemed to have exhausted the remedies available in the  
23 courts of the State, within the meaning of this section, if he has the right under the law of  
24 the State to raise, by any available procedure, the question presented." 28 USCA §

1 2254(c). Respondent concedes that the petitioner has the ability to file a collateral  
2 challenge in state court (ECF No. 15, page 12 and 13).

3       Petitioner is facing the possibility of a life sentence. Further he faces life on  
4 community custody if he is released from prison and he may be returned to prison and  
5 again face a life sentence. Under these facts, petitioner should be given every  
6 opportunity possible to develop the record and facts. The court declines to recommend  
7 dismissal of the entire petition.

8       2.     Mixed petitions  
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10       A petitioner who has filed a mixed petition has the choice of amending the petition  
11 by deleting the unexhausted claims, or dismissing the petition and pursuing the  
12 unexhausted claims in state court. Rose v. Lundy, 455 U.S. 509, 510 (1982)

13       Dismissal without prejudice of the entire petition is not an option because a federal  
14 court cannot dismiss a mixed petition without giving the petitioner the opportunity to  
15 either return to state court (dismissal by a motion by the petitioner), or dismissal or  
16 amendment of unexhausted claims and proceeding forward on only the exhausted claims.  
17 Rose v Lundy, 455 U.S. 509, 510 (1982); Jefferson v. Budge, 419 F.3d 1013, 1015-16  
18 (9th Cir. 2005).

19       The court recommends that petitioner be given the option of dismissing the second  
20 ground for relief and proceeding on the first ground for relief, or dismissing this petition  
21 without prejudice and returning to state court. Petitioner should be ordered to make a  
22 decision and inform the court of his choice within thirty days of the court adopting this  
23 report and recommendation.  
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Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of de novo review by the District Court Judge. See, 28 U.S.C. 636 (b)(1)(C). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on October 28, 2011, as noted in the caption.

J. M. Handwritten

REPORT AND RECOMMENDATION - 10

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